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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EDWARD RACEK, Plaintiff and Appellant, v. RADY CHILDREN'S HOSPITAL OF SAN DIEGO, Defendant and Respondent.	D058173 (Super. Ct. No. 37-2009-00081893-CU-NP-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Edward Racek, M.D., appeals from a judgment against him in his lawsuit against Rady Children's Hospital of San Diego (the Hospital) arising out of the Hospital's staffing decision to assign Racek to fewer primary call shifts and more back-up call shifts in the Hospital's trauma center. As we will explain, we conclude that the trial court properly sustained the Hospital's demurrer to Racek's causes of action alleging violations of antitrust and unfair business practice laws, and that the trial court properly granted

summary judgment on Racek's causes of action for breach of oral contract and quantum meruit. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Hospital operates a pediatric trauma center in San Diego. Racek is a board certified general surgeon, who worked in the Hospital's trauma center for over 20 years, but he is not certified as a pediatric surgeon. The Hospital assigns physicians to be on call in the trauma center by assigning them to either a "primary call" shift or a "back-up call" shift. Physicians are compensated for each shift they are on call in the trauma center, with the physician working the primary call shift paid more than the physician working the back-up call shift. According to Racek, the Hospital also has policies (1) permitting only pediatric surgeons to perform trauma surgery, even when a general surgeon is on trauma call;[1] and (2) permitting only pediatric surgeons to be on call to perform general surgery.

In January 2009 Racek filed a complaint against (1) the Hospital; (2) Children's Specialists of San Diego (CSSD), which is a pediatric specialty medical group; and (3) two physicians who worked shifts in the Hospital's trauma center and were members of CSSD — Mary Hilfiker, M.D., and Nicholas Saenz, M.D. Hilfiker was also the

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1 Although the record does not specifically describe the duties of a physician on trauma call, we infer that the duties are distinct from performing trauma surgery.

director of the Hospital's trauma center with responsibility for coordinating the schedule of physicians to work the primary call and back-up call shifts.

Racek's complaint alleged that in 2003 the former director of the Hospital's trauma center, Dr. Barry LoSasso, orally agreed to provide Racek with at least six to eight primary call shifts per month or at least as many primary call shifts as the busiest primary call doctor. According to Racek, he terminated his position providing trauma care at another hospital to participate in the promised trauma call shifts at the Hospital.

As alleged in the complaint, after Hilfiker replaced LoSasso as director of the Hospital's trauma center, Hilfiker stated in October 2006 that she intended to give preference to pediatric surgeons, instead of general surgeons, when assigning trauma call shifts. The complaint alleged that as a result of the change in policy, Racek's assignment to primary call shifts "decreased to 2.5 to 5 per month," and the assignment of other general surgeons to primary call shifts in the Hospital's trauma center similarly decreased. According to the complaint, while decreasing the assignment of general surgeons to primary call shifts, Hilfiker also increased the assignment of general surgeons to back-up call shifts, with Racek's assignment to back-up call shifts averaging nine per month. Although not explained in the complaint, other documents submitted in connection with a summary judgment motion show that Hilfiker's implementation of these policies on behalf of the Hospital coincided with a review of the certification of the Hospital's trauma program by the American College of Surgeons in February 2006. The review noted that one weakness of the Hospital's trauma program was that "three of the five core surgeons on the trauma panel were general surgeons who took trauma call but did not operate or

provide inpatient care," which detracts from continuity of care. The review noted that "[o]nly two of the seven pediatric surgeons take primary trauma call."

The complaint also alleged that it was often the case that the physician assigned to the back-up call shift would end up being required to report to the Hospital for duty when a pediatric surgeon was assigned to the primary call shift. As the complaint explained, this was because pediatric surgeons were allowed to simultaneously be assigned to general pediatric surgery call and would often end up performing general pediatric surgery rather than being able to cover the trauma care duties, necessitating that the physician on the back-up call shift report to the Hospital. Racek alleged that when on back-up call shift, he was to perform primary call duties approximately 74 percent of the time.

Against all of the defendants, the complaint alleged causes of action for (1) antitrust violations under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.)[2] and (2) violation of the Unfair Competition Law (§ 17200 et. seq.) (the UCL). Against the Hospital alone, the complaint further asserted causes of action for breach of oral contract, and recovery of the reasonable value of services rendered under a theory of quantum meruit. A cause of action against Hilfiker alone alleged intentional interference with prospective economic advantage.

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2 All further statutory references are to the Business and Professions Code unless otherwise specified.

Without granting Racek leave to amend his complaint, the trial court sustained the demurrers filed by each of the defendants to the antitrust and unfair business practices causes of action as well as the cause of action for intentional interference with prospective economic advantage against Hilfiker.

The Hospital filed a motion for summary judgment on the remaining causes of action for breach of oral contract and quantum meruit. The trial court granted the summary judgment motion and entered judgment in favor of the Hospital.

Racek appeals from the judgment in favor of the Hospital, but he has not pursued an appeal as to the other defendants.

II

DISCUSSION

A. *The Trial Court Properly Sustained the Hospital's Demurrer to the Cartwright Act and Unfair Competition Causes of Action*

We first consider Racek's challenge to the trial court's order sustaining the Hospital's demurrer to the causes of action alleging (1) an antitrust conspiracy in violation of the Cartwright Act and (2) violation of the UCL.

1. *Standard of Review*

"'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.'" (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if

proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.)

2. *The Cartwright Act Cause of Action*

"The Cartwright Act states that '[e]xcept as provided in this chapter, every trust is unlawful, against public policy and void.' (§ 16726.) Section 16720 defines the term 'trust' as 'a combination of capital, skill or acts by two or more persons' for certain enumerated anticompetitive purposes, including '[t]o create or carry out restrictions in trade or commerce.' (§ 16720, subd. (a).) That prohibition is analogous to the catchall language of section 1 of the Sherman Act (15 U.S.C. § 1), which prohibits '[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.' [Citation.] Thus, although the Cartwright Act was not patterned after the Sherman Act [citations], federal case law interpreting the Sherman Act is often a useful aid in interpreting the

Cartwright Act [citations]." (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1374 (*Flagship Theatres*).)

"Under both Cartwright Act and Sherman Act case law, some restraints of trade are treated as per se unlawful, while others are analyzed under the 'rule of reason.' 'In general, only unreasonable restraints of trade are prohibited. [Citation.] However, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [Citation.] Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. [Citations.]' [Citation.] Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects." (*Flagship Theatres, supra*, 198 Cal.App.4th at p. 1374.)

"A cause of action for violation of the Cartwright Act '"'must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts.'"'" (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 373.) For "plaintiffs to recover damages for antitrust violations, they 'must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" (*Flagship Theatres*, *supra*, 198 Cal.App.4th at p. 1378.) "[T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct . . . ," and that the plaintiff's

"'loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.'" (*Id*. at pp. 1380, 1381.)

"'California requires a "high degree of particularity" in the pleading of Cartwright Act violations [citation], and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] . . . The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient.'" (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 493 (*Marsh*).)

Racek's complaint alleged that the Hospital violated the Cartwright Act when it, "by and through Dr. Hilfiker, and CSSD, along with Dr. Saenz, through their interlocking business and personnel [*sic*] relationships . . . effectively conspired against Dr. Racek and other trauma surgeons in order to increase the CSSD's pediatric surgeons' Primary Trauma Call shifts and limit or restrain general surgeons, such as Dr. Racek, from participating in Primary Trauma Call shifts." Racek alleged that this conduct amounted to "a conspiracy to restrain trade and prohibit competition." He further alleged that the conspiracy in violation of the Cartwright Act consisted of "allowing only pediatric surgeons to be on general surgery call duty," "requiring that all trauma surgeries . . . be performed by pediatric surgeons," and "giv[ing] preference to the pediatric surgeons for all surgeries." The purported injury identified in the complaint stemming from this alleged anticompetitive conduct was "substandard care being provided at Children's Hospital" occurring "when pediatric surgeons schedule necessary and emergent surgeries for later times . . . to accommodate pediatric surgeons['] schedules, as opposed to

scheduling such surgeries sooner with a general surgeon." The complaint also alleged injury in the form of "restraining Dr. Racek and other general surgeons from performing trauma and general surgeries at [the Hospital]."

The Hospital presented several arguments in support of its demurrer to the Cartwright Act cause of action, among which were that the complaint (1) did not sufficiently allege a conspiracy involving two or more persons and (2) did not identify conduct unreasonably restraining trade or prohibiting competition. As we will explain, both of these arguments have merit.

We first discuss whether the complaint sufficiently alleges a conspiracy involving two or more persons. A violation of the Cartwright Act requires "a combination of capital, skill or acts by two or more persons" for prohibited purposes. (§ 16720.) "'[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543.) "'[A]n individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute.'" (*Id*. at p. 544.) "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720.) Because "[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition . . . ," "officers or employees of the same firm do not provide the plurality of actors imperative for a[n] [antitrust] conspiracy." (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769.) Therefore, "it is well settled that a complaint for antitrust violations which fails to allege . . . concerted action by separate entities

maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 266 (G.H.I.I.).)

The complaint vaguely refers to a conspiracy involving the "Hospital, by and through Dr. Hilfiker, and CSSD, along with Dr. Saenz" accomplished "through their interlocking business and personnel [*sic*] relationships." As we have described, the complaint identifies the prohibited restraint of trade as consisting of the Hospital's policies preferring pediatric surgeons in certain types of staffing decisions over general surgeons. However, those policies were put in place by the Hospital, and to the extent they include the policy stated by Hilfiker of scheduling fewer general surgeons for primary call shifts, that policy was enacted in her capacity as an agent of the Hospital in her role as its trauma center director. The complaint contains no allegations of how CSSD or Saenz participated in the purported conspiracy or the setting of the Hospital's staffing policies. "General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof." (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 318.) As the complaint's specific allegations of participation in the conspiracy are limited to acts by the Hospital and Hilfiker acting as the Hospital's agent, it fails to adequately plead "concerted action by separate entities maintaining separate and independent interests" as required by the Cartwright Act. (*G.H.I.I., supra*, 147 Cal.App.3d at p. 266.) Demurrer was proper on that ground.

The other meritorious basis for demurrer is the complaint's failure to identify conduct unreasonably restraining trade or prohibiting competition in the relevant market.

As explained in a persuasive opinion by the federal Seventh Circuit Court of Appeals, "without something more, a staffing pattern dispute at one hospital does not cause an unreasonable restraint of trade within the ambit of the antitrust laws." (*BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Assn.* (7th Cir. 1994) 36 F.3d 664, 668, fn. 3 (*BCB Anesthesia*).) "The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason — there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. [Citation.] A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. [Citation.] Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions. [¶] Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act." (*Id.* at p. 667.)[3] "A staffing decision does not itself

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3 Racek argues that the Hospital and its alleged coconspirators engaged in a "group boycott" of general surgeons or a "horizontal restraint," which under relevant case law constitute per se unreasonable restraints on trade and therefore relieve the court from having to apply a rule of reason analysis to determining whether Racek identified an unreasonable restraint of trade in the relevant market. We disagree. First, Racek has not identified a horizontal restraint, which involves "entities at the same level combining to deny a competitor at their level the benefits enjoyed by the members of the group." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 195, fn. 26.) The Hospital is not at the *same level* of market structure as Racek because it does not compete with him as a surgeon. Second, the type of "group boycott" that constitutes a per se unreasonable restraint of trade arises when there is an effort "to disadvantage competitors

constitute an antitrust injury. 'If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.'" (*Id*. at p. 669.)

Relying on *BCB Anesthesia*, this court recently explained in the context of a Cartwright Act challenge to a hospital staffing decision that "[b]efore a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by the plaintiffs, was outside of reasonable professional standards." (*Marsh*, *supra*, 200 Cal.App.4th at p. 499.) In *Marsh*, the plaintiff anesthesiologist who complained about a hospital's staffing policies did not establish an unreasonable restraint of trade or prohibition on competition because she did not identify any effect on competition in either the market for anesthesiologists in area hospitals or the consumer market for patients who use the services of anesthesiologists. (*Id*. at pp. 499-500.)

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by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' . . . In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." (*Northwest Stationers v. Pacific Stationery* (1985) 472 U.S. 284, 293-294, citations omitted.) That is not the situation described by the complaint. Instead, as we have explained, this case involves a hospital's internal staffing decisions, and case law invariably analyzes antitrust challenges to such staffing decisions under a rule of reason analysis rather than finding them to constitute a per se unreasonable restraint on trade. (*BCB Anesthesia*, *supra*, 36 F.3d at p. 667.)

Here, too, Racek has not identified unreasonable anticompetitive conduct because there is no indication that the Hospital's staffing policies regarding general surgeons and pediatric surgeons effect competition in the market for surgical or trauma care services in the San Diego area, either as to the surgeons who seek to offer their services in that market or the patients who use those services. Racek complains that he and the other general surgeons at the Hospital have been injured, but the Hospital is simply his place of employment, and is not the same as the San Diego area market for general surgical services. Thus, as in *Marsh* and *BCB Anesthesia,* Racek "did not allege . . . the kind of 'facts indicating special circumstances raising antitrust concerns,' with respect to any detrimental effect on competition that caused injury, in excess of [his] own personal business concerns and circumstances." (*Marsh*, *supra*, 200 Cal.App.4th at p. 500, quoting *BCB Anesthesia*, *supra*, 36 F.3d at p. 668.) To state a claim under the Cartwright Act for unreasonable restraint of trade, "a complaint must allege 'facts from which injury to market-wide competition can be inferred.'" (*Marsh*, at p. 495.) Racek has failed to plead a claim under the Cartwright Act because he has not identified an injury to market-wide competition sufficient to establish an unreasonable restraint on trade.[4] Demurrer was therefore proper on this ground as well.

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4 Racek contends that he has identified "serious anti-competitive injury in that the Hospital's acts have resulted in substandard care being offered to the patients of the only designated pediatric trauma center in San Diego County." He is apparently referring to the complaint's allegation that due to the Hospital's purported policy of giving preference to pediatric surgeons for all surgeries and only allowing pediatric surgeons to be on general surgery call duty, surgeries are not scheduled as soon as they would be if general surgeons were allowed to operate. The problem with this argument is that an antitrust

Racek briefly argues that the trial court should have granted him leave to amend his complaint to cure the pleading defects identified by the Hospital. However, Racek has made no attempt to explain how he would amend his complaint to address the deficiencies we have noted above. Therefore, we conclude that the trial court properly sustained the demurrer to the Cartwright Act cause of action without leave to amend.

3. *The UCL Cause of Action*

We next consider the order sustaining the demurrer to the cause of action for violation of the UCL. "Section 17200 . . . defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' The broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers. [Citation.] An act or practice may be actionable as 'unfair' under the unfair competition law even if it is not 'unlawful.'" (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 374.)

To the extent that Racek bases his UCL claim on the allegation that the Hospital acted *unlawfully* in that it violated the Cartwright Act, that claim is foreclosed by our rejection of the Cartwright Act claim.

Racek also argues that the Hospital has committed an *unfair* act or practice in violation of the UCL. As Racek acknowledges, our Supreme Court has significantly limited the meaning of the term "unfair" in the context of cases where the wrong complained of is anticompetitive conduct. "When a plaintiff who claims to have suffered

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claim requires an *injury to competition* in the market, and the alleged provisions of substandard care is not an injury to the competitiveness of the marketplace.

injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) For the same reason that Racek has not identified an actual violation of the antitrust laws, he also has not identified an incipient violation. Put simply, Racek has not described a threatened injury to competition in any relevant market.

Racek also argues that it was "unfair" for the Hospital to allegedly pay him the compensation for working a back-up call shift on those allegedly excessive instances when he was called to provide trauma care because the pediatric surgeon assigned to the primary call shift was busy performing pediatric surgery. However, that allegation amounts to no more than an individual complaint about the terms of his contract for compensation with the Hospital for working back-up call shift, and is thus not an "unfair" practice within the meaning of the UCL. As our Supreme Court has explained, "the UCL 'is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair

competition.'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.)

We accordingly conclude that the trial court properly sustained the Hospital's demurrer to the UCL cause of action. Further, because Racek has not attempted to explain how he could amend his complaint to state a claim under the UCL, the trial court properly denied leave to amend.

B. *The Trial Court Properly Granted Summary Judgment on the Breach of Oral Contract and Quantum Meruit Causes of Action*

We next consider Racek's challenge to the trial court's order granting summary judgment in favor of the Hospital on the causes of action for breach of oral contract and quantum meruit.

1. *Legal Standards Applicable to Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or

defense. (*Aguilar, supra,* 25 Cal.4th at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar,* at p. 850.)

We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

2. *The Cause of Action for Breach of Oral Contract*

Racek alleged that the Hospital entered into an oral contract with him when the former director of the Hospital's trauma center, LoSasso, told Racek that he would be assigned "at least 6 to 8 Primary Trauma Call shifts per month, or at least as many shifts as the busiest Primary Trauma Call doctor." The complaint alleges that the promise was made in 2003. However, in a declaration filed in opposition to the Hospital's summary judgment motion, Racek stated that the promise was made in 2005. According to Racek, the Hospital breached that agreement when Hilfiker became director of the trauma center

and assigned Racek to fewer primary call shifts and more back-up call shifts because he was not a pediatric surgeon.

The Hospital moved for summary judgment on the breach of oral contract cause of action on several grounds, one of which was that it was barred by the statute of limitations. As we find that ground to be dispositive of the motion for summary judgment, we will limit our discussion accordingly.

The statute of limitations applicable to a cause of action for breach of oral contract is two years. (Code Civ. Proc., § 339, subd. (1).) Racek filed his lawsuit in January 2009.

In support of its summary judgment motion, the Hospital relied on evidence that Hilfiker became the new director of trauma services and reduced Racek's primary call shifts in 2006, which was more than two years before Racek filed his complaint in 2009. Specifically, the Hospital pointed out that in a response to an interrogatory, Racek stated that "[i]n 2006, Dr. Hilfiker, as the new head of the trauma department, breached the agreement made by Dr. Lo[S]asso, by reducing the number of primary call trauma shifts assigned to Dr. Racek."[5] The breach that Racek identified occurring in 2006 took place

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[5] This statement is consistent with Racek's complaint, which states that "[s]tarting in or about October 2006, and continuing to the present, [the Hospital] breached the oral agreement" by failing to assign him to the shift promised by LoSasso. It is also consistent with the statement in Racek's declaration that "in October 2006, Dr. Hilfiker announced that she would give preference to pediatric surgeons for primary trauma call shifts," and that according to his review of data beginning in the Fall of 2006, his primary call shifts "decreased to 2.5 to 5 per month," and his back-up call shifts increased to approximately 11 per month.

more than two years before Racek filed his complaint in 2009, and therefore a cause of action based on that breach is barred by the two-year statute of limitations set forth in Code of Civil Procedure section 339, subdivision (1).

Racek contends that despite the fact that Hilfiker first reduced Racek's primary call shifts in 2006, the two-year statute of limitations does not bar his claim for breach of oral contract for two reasons: (1) the Hospital committed an "ongoing breach" of the oral contract each month it continued to assign him to fewer primary call shifts than LoSasso promised; and (2) the Hospital is estopped from relying on the statute of limitations because up until 2008, Hilfiker's supervisor at the Hospital told Racek that he was "looking into" the situation regarding Racek's shift assignments.

We find no merit to Racek's argument that his action for breach of oral contract is saved from the statute of limitations bar on the ground that the Hospital committed an ongoing breach. "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Sav. Bank* (1954) 123 Cal.App.2d 145, 149.) "The limitations period begins to run when the plaintiff possesses a true cause of action, i.e., where events have developed to a point where the plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 614.) In limited circumstances, the nature of the promise is such that the obligation is "continuing, so that each failure to perform results in a new breach, giving rise to a new cause of action." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 522, p. 667.) However,

Racek has identified no authority from which we could conclude that an agreement to provide a specific staffing assignment in an ongoing employment relationship is the type of obligation that continually gives rise to a new breach and thus avoids a statute of limitations bar. The only authority that Racek cites is entirely inapposite, as it deals with the accrual of a cause of action for unpaid wages, holding that a distinct cause of action accrues on each payday as a separate failure to pay the specific obligation due for that payday. (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 859.) In contrast, this case deals with a *single* and *specific* alleged contractual obligation to assign Racek to the primary care shifts promised by LoSasso. According to Racek's own interrogatory responses, the Hospital breached that specific obligation in 2006, and he suffered injury as of that date. Therefore, the cause of action accrued in 2006 and was barred by the statute of limitations by the time the complaint was filed in 2009.

We also reject Racek's contention that the Hospital is estopped from asserting the statute of limitations. As support for his estoppel argument, Racek relies on his declaration, which describes his conversations with Dr. Buzz Kaufman at the Hospital, whom he describes as supervising Hilfiker in her role as the director of the trauma center. According to Racek, he met with Kaufman for the first time in the Fall of 2006 regarding his decreased primary call shift assignments. Racek stated in his declaration that Kaufman instructed him to collect data regarding each surgeon's shifts in the trauma center, and that "[s]everal months later" Racek met with Kaufman to review those findings, at which point Kaufman "indicated that he would review my data and otherwise 'look into' the situation." Racek declared that "[a]t some point, in 2008, Dr. Kaufman

affirmatively stated to me that the Hospital would not honor Dr. Lo[S]asso's agreement with me regarding my number of primary call shifts."

"'"Equitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice."'" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*).) Equitable estoppel to rely on the statute of limitations is based on the principle that "'"[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought."'" (*Ibid.*)

Racek makes very clear that he is not relying on the doctrine of equitable tolling, under which "the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded." (*Lantzy*, *supra*, 31 Cal.4th at p. 370.) In contrast, the doctrine of equitable estoppel, on which Racek relies, "'"comes into play only *after* the limitations period has run."'" (*Id.* at p. 383, italics added.) If the defendant's misleading conduct ceased before the running of the statue of limitations, and thus did not prevent the defendant from filing suit within the applicable limitations period, the doctrine of equitable estoppel does not apply. (*Vaca v. Wachovia Mortgage*

Corp. (2011) 198 Cal.App.4th 737, 746.) Here, Racek has not established that Kaufman continued to "look into" the staffing issue after the date that the statute of limitations bar arose in October 2008. Instead, Racek's declaration vaguely states that "[a]t some point, in 2008," Kaufman stated that the Hospital would not honor the oral agreement allegedly made by LoSasso. Therefore, Racek has not established that the Hospital caused him to wait until after the statute of limitations had expired to file his lawsuit.

Further, Kaufman's statement that he was "looking into" the staffing assignments was not enough to create an equitable estoppel because it was merely a promise to investigate whether an already-existing breach would be cured, with no promise of what the outcome would be. A defendant is equitably estopped from invoking the statute of limitations when it makes representations that "mak[e] it unnecessary to sue." (*Lantzy, supra,* 31 Cal.4th at p. 384.) For instance, estoppel arises where there has been a promise of settlement (*Flintkote Co. v. Presley of Northern California* (1984) 154 Cal.App.3d 458, 465) or when the defendant represents "that all actionable damage has been or will be repaired." (*Lantzy*, at p. 384.) In such instances, a plaintiff may be able to prove — as necessary to establish estoppel — that it has reasonably relied on the defendant's conduct to its detriment. (See *Lantzy*, at p. 384 [estoppel requires that "the plaintiff reasonably relies on [the defendant's] representation to refrain from bringing a timely action"].) A statement that Kaufman would "look into" the staffing issue is not a promise of settlement or other promise to redress the alleged contractual breach asserted by Racek. Therefore, it is not a statement sufficient to create the reasonable reliance needed to equitably estop the Hospital from relying on the statute of limitations.

Racek has identified no basis to avoid the statute of limitations from applying to his cause of action for breach of oral contract. Accordingly, we conclude that the trial court properly granted summary judgment on that cause of action.

3. *The Quantum Meruit Cause of Action*

Racek's cause of action for quantum meruit is based on his claim that he should have been paid more for those shifts when he was assigned to a back-up call shift but was called to perform the duties of the primary call doctor because that doctor was busy in surgery. As we will explain, the quantum meruit claim fails because an express contract covers the same subject.

As the Hospital established through the evidence that it submitted in support of its summary judgment motion, the terms of Racek's provision of trauma services for the Hospital were set forth in a written contract which (1) described the duties performed by physicians while on primary call and back-up call and (2) specified the compensation that Racek would be paid when assigned to a primary call shift and a back-up call shift. The essence of Racek's quantum meruit claim is that the compensation for the back-up call shifts provided in his express agreement was insufficient because of the disproportionate number of times that he was called into the hospital to perform trauma center duties when he was on back-up call.

"Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996)

41 Cal.App.4th 1410, 1419.) Thus, "it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." (*Ibid*.) "'The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability.'" (*Ibid*.)

Because Racek's express agreement with the Hospital sets forth the compensation he is to receive when assigned to a back-up call shift, he may not bring a cause of action in quantum meruit seeking additional compensation for doing that work.[6]

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6 In addressing the quantum meruit cause of action in his appellate briefing Racek argues that under the terms of his written agreement with the Hospital, he should have been compensated at the rate applicable to primary call shifts whenever he was on back-up call duty and called to perform the duties of a physician on primary call. However, that argument describes a claim for breach of contract, not a claim for quantum meruit, which, as we have explained, cannot exist when an express contract covers the same subject matter. We have seen no indication in the record that Racek intends to assert a cause of action against the Hospital for breach of his written contract; he has chosen to proceed under a theory of quantum meruit.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

MCCONNELL, P. J.

HALLER, J.